

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

MARGARET JEFFERY,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

(C871923807)

DOCKET NUMBER  
CH08318710619

DATE: JUL 8 1988

Margaret Jeffery, Jeffersonville, Indiana, pro se.

Bruce Hughes, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that sustained the Office of Personnel Management's (OPM) reconsideration decision denying her service credit for retirement purposes for work she performed for the Veterans Farm Training Program, in the Cave City, Arkansas, school system, from April 1947, through April 1950. For the reasons discussed in this Opinion and Order, the petition is DENIED because it does not meet the

criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

#### BACKGROUND

OPM denied the appellant service credit for retirement purposes for her work at issue on the ground that she was not a Federal employee, because she had not been formally appointed to a Federal civil service position during the time period.\* The appellant timely petitioned for appeal of OPM's reconsideration decision.

After affording the parties a hearing, at which OPM was not represented, the administrative judge issued an initial decision affirming OPM's final decision. The administrative judge found that: (1) The evidence showed that the appellant had been engaged in the performance of a Federal function and had been under the supervision of a Federal official while engaged in the performance of the duties of her position, but the evidence did not show that she had been appointed in the civil service by a Federal official acting in his official capacity so as to qualify her as an "employee" under 5 U.S.C. § 2105(a); and (2) therefore, her service was not creditable for civil service retirement purposes under *Horner v. Acosta*, 803 F.2d 687, 691-93 (Fed.

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\* See Initial Appeal File, Tab 5.

Cir. 1986), and *Price v. Office of Personnel Management*, 32 M.S.P.R. 159, 161-62 (1987).

The appellant's petition for review contends, for the first time, that OPM's failure in the proceedings below to fully comply with the administrative judge's procedural orders, and to attend the hearing and present its case, warranted the entry of a default judgment in her favor. OPM has not responded to the petition.

#### ANALYSIS

The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. E.g., *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant has not made such a showing in this case concerning her allegations of error by OPM. Accordingly, her allegations are not entitled to further consideration.

However, even upon consideration of the appellant's specific contentions, we find that they lack merit. The appellant has the burden of showing her entitlement to civil service retirement credit for the years in dispute. See *Huskey v. Office of Personnel Management*, 27 M.S.P.R. 363, 365 (1985), *aff'd*, 790 F.2d 92 (Fed. Cir. 1986). She failed to carry her burden of showing her entitlement to such service credit. Additionally, the authority of an administrative judge to impose sanctions for failure to

comply with his or her orders does not include the authority to rule against an agency on the merits as a sanction for not responding to such orders or failing to defend an administrative action. See *Crisler v. Federal Emergency Management Agency*, 32 M.S.P.R. 578, 580 (1987); *Mittendorf v. Office of Personnel Management*, 9 M.S.P.R. 484, 485 (1982). Indeed, the Board itself lacks the authority to enter a default judgment as a sanction against OPM in this case. Such a ruling would, in effect, grant the appellant retirement benefits where it has not been determined that she is legally entitled to them. See *Mittendorf*, 9 M.S.P.R. at 486; *Miller v. Office of Personnel Management*, 7 M.S.P.R. 469, 474-75 (1981).

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

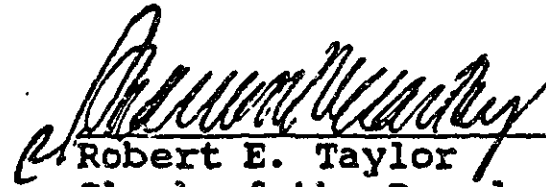
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board